SIMPSON · DELMORE · GREENE
MARCH 2019
Employment Law UPDATE

Terence L. Greene 619-702-4308 tgreene@sdgllp.com
Elizabeth Donovan 619-702-4322 edonovan@sdgllp.com
Ross M. Poole 619-702-4307 rpoole@sdgllp.com
Cassandra Bolten 619-702-4333 cbolten@sdgllp.com

EMPLOYEES REQUIRED TO CALL BEFORE SHOWING UP ARE ENTITLED TO REPORTING TIME PAY EVEN WHEN THEY ARE NOT CALLED TO WORK

California law has long required employees to be paid "reporting time pay" when an employee reports to work, but is sent home before working at least half of the scheduled shift. An employee must receive reporting time pay for half of their usual or scheduled day's work, but in no event less than two hours or more than four hours.

In a new twist, the California Court of Appeal recently ruled that employees were owed reporting time pay when required to simply *call in* two hours before their scheduled shift to see if they needed to come to work, and were told they did not need to come in. In other words, the court ruled that *physically* reporting to work was not necessary to earn reporting time pay. The court reasoned that these call-in shifts prevent an employee from making other plans such as attending school or working other jobs, and may unnecessarily require employees to find childcare if they are not called in to work.

Employers who utilize these call-in shifts likely owe reporting time pay for any past violations. For strategies on how to rectify past violations, legal counsel should be consulted. Call-in practices should be reviewed and modified with the help of counsel to ensure compliance with California's reporting time pay requirement.

A SINGLE DISCLOSURE AND CONSENT FORM FOR BACKGROUND CHECKS IS NOT ENOUGH—FEDERAL AND CALIFORNIA FORMS MUST BE SEPARATE

Employers seeking to run background checks on applicants or employees in California must not only abide by the federal Fair Credit Reporting Act (FCRA), but must also comply with California's background check obligations under the Investigative Consumer Reporting Agencies Act (ICRAA). Both laws require that prior to conducting a background check, an employer must provide a written disclosure of its intent to do so, and obtain the applicant's or employee's consent. The disclosure and consent must be both "clear and conspicuous," and contained in a standalone document that provides only the information required by law without any "extraneous" information. For example, the Ninth Circuit sparked an onslaught of

FCRA class action litigation a few years ago when it ruled that a liability waiver on the disclosure and consent form was "extraneous" and in violation of the FCRA.

In its most recent decision regarding background checks, the Ninth Circuit ruled that the requirements of the FCRA and the ICRAA mandate one disclosure and consent form for the FCRA, and another disclosure and consent form for the ICRAA. The court said that employers may not combine the overlapping disclosures from the FCRA and the ICRAA into a single disclosure and consent form because doing so violates the mandate that the disclosure be standalone and free from extraneous information. This means that employers with combined disclosure and consent forms could be subject to penalties under both the FCRA and the ICRAA.

To avoid potential penalties under the FCRA of up to $1,000 per affected individual, and up to $10,000 per individual under the ICRAA, employers in California conducting background checks must have separate state and federal disclosure and consent forms. Additionally, employers should consult legal counsel to ensure that the forms do not include any additional information that is "extraneous" to what is required under the FCRA or the ICRAA. Of course, the laws have different disclosure requirements, so what is considered "extraneous" under one may not be "extraneous" under the other.

BUSINESS WEBSITES MUST BE ACCESSIBLE TO THE BLIND

The Americans with Disabilities Act (ADA) requires places of public accommodation—businesses open to the public—to provide full and equal access to people with disabilities. Historically, this requirement applied to a business's actual facilities, obligating the business to provide accommodations such as ramps and modified restrooms. However, in a recent decision, the Ninth Circuit Court of Appeals ruled that Domino's Pizza was required to make its website accessible to the blind since the website provided access to the actual store through online ordering and coupons. Specifically, the court required the Domino's Pizza website to be accessible with screen-reading software in order to "provide the blind with effective communication and full and equal enjoyment of its products and services." The fact that the Department of Justice—the government agency responsible for setting accommodation standards under the ADA—had not issued standards for website and app accessibility did not keep the court from finding that Domino's Pizza violated the ADA.

ADA lawsuits based on a business's failure to provide full and equal access to its facilities are prevalent and likely to become even more common after this decision. Businesses should immediately update their websites to protect themselves from ADA lawsuits. Questions regarding compliance with the ADA should be directed to counsel.

PAYROLL SERVICES MAY NOT BE SUED DIRECTLY BY EMPLOYEES FOR WAGE AND HOUR VIOLATIONS

It is common for employers to contract with third party payroll services to manage employee payroll. Payroll companies give employers peace of mind by holding themselves out as having expertise in the areas of payroll and compliance with wage and hour laws. Unfortunately, despite their "expertise," there are many instances where employees sue California employers for wage and hour violations, including improper calculation of overtime and failure to provide complete and accurate wage statements, that were caused by the payroll company.

In a recent decision, California's Supreme Court held that an employee could not directly sue a payroll company for wage and hour violations caused by the payroll company. The Court reasoned that the payroll company is not the employee's employer, and that employees cannot sue the payroll company on a theory that they are third party beneficiaries of the payroll services contract between the employer and the payroll company. This means that employees must continue to sue the employer directly for all wage and hour violations, regardless of whether they were the fault of the employer or the payroll service. However, the Court's decision does not preclude an employer from filing a cross-complaint against a payroll company that causes the wage and hour violations for which the employer is sued. The resolution of an employer's cross-complaint against a payroll company would likely be determined by the terms of the contract between the payroll company and the employer.

This case emphasizes the importance of having an indemnity clause in any contract with a payroll company. Employers would be wise to have counsel closely examine their payroll services contracts to determine what, if any, obligation the payroll company has to indemnify the employer in the event of a wage and hour violation that is the payroll company's fault. These indemnity obligations should be taken into consideration when employers shop for payroll companies. Additionally, employers using payroll companies—or even those who aren't—should have counsel audit their payroll practices to ensure compliance with California's ever-changing wage and hour laws.

Downtown San Diego
600 West Broadway, Fourth Floor
San Diego, CA 92101

North San Diego
11858 Bernardo Plaza Court, Suite 110
San Diego, CA 92128

www.sdgllp.com